No. ———

In the Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
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HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

———

NIGHTTIME CONCEPTS, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

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v.

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Respondent.

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Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Twenty-first Amendment strip commercial speech concerning alcohol beverages of all First Amendment protection, thereby reducing judicial scrutiny of Pennsylvania's ban on price advertising from the rigorous *Central Hudson* test to whether the ban "bear[s] a reasonable relation to the evil sought to be controlled?"

2. Does Pennsylvania's ban on price advertising for alcohol beverages violate the First Amendment, particularly where (a) the government omits its own advertising from that ban, (b) the government introduced no evidence that its ban will directly and materially advance its asserted purpose of reducing excessive consumption, and (c) the government contradictorily concluded in 1985 that price advertising for beer does not cause increased consumption?

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PETITION FOR A WRIT OF CERTIORARI

Hospitality Investments of Philadelphia, Inc. and Nighttime Concepts, Inc. respectfully petition for a writ of certiorari to review the judgments of the Supreme Court of Pennsylvania in these cases.[1]

OPINIONS BELOW

The opinions of the Supreme Court of Pennsylvania (App., *infra,* 1a-20a) are reported at —— A.2d ——, The opinions of the Court of Common Pleas of Philadelphia County (App., *infra,* 21a-28a), the Pennsylvania Liquor Control Board (App., *infra,* 29a-36a) and the Administrative Law Judge (App., *infra,* 37a-48a) are unreported.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgments on November 3, 1994. *See* App., *infra,* 6a-17a, 19a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. This is a Rule 12.2 petition involving three related cases decided together by the Supreme Court of Pennsylvania.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Twenty-first Amendment to the United States Constitution provides, in relevant part, that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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[1] Hospitality Investments of Philadelphia, Inc. and Nighttime Concepts, Inc. are both Pennsylvania corporations. Neither corporation has a parent company or any subsidiaries.

Section 4-498(a) of the Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, § 4-498(a) (1969 & Supp. 1994), provides, in relevant part, that "[n]o manufacturer, wholesaler, retailer or shipper . . . and no licensee under this act shall cause or permit the advertising in any manner whatsoever of the price of any malt beverage, cordial, wine or distilled liquor offered for sale in this Commonwealth . . . ." Section 4-498(b) further provides that "[a]ny person who violates any of the provisions of this section commits a misdemeanor . . . ."[2]

STATEMENT

The Supreme Court of Pennsylvania held that the Twenty-first Amendment supplants the First Amendment when commercial speech concerns alcohol beverages. Declining to apply the *Central Hudson* test to its review of Section 4-498, the Court instead upheld Pennsylvania's ban on price advertising by applying a rational basis test.

Respondent, the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), is responsible for enforcing the Pennsylvania Liquor Code. App., *infra*, 2a. Petitioners are holders of restaurant liquor licenses issued by the Pennsylvania Liquor Control Board ("Liquor Board"). On three occasions during 1989 and 1991, the Bureau charged petitioners with violating Section 4-498 of the Liquor Code by advertising in newspapers the prices of alcohol beverages offered for sale at petitioners' bars. *Id.* at 37a, 41a, 45a. No suggestion has ever been made that the advertisements were false or misleading. The three citations gave rise to these three separate cases that were decided together by the Pennylvania courts.[3]

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[2] Pennsylvania Statutes Annotated, Title 47, § 4-498 is reproduced in full in the Appendix. App., *infra*, 49a.

[3] Citations to the records in the three cases before the Supreme Court of Pennsylvania are abbreviated as parenthetically indicated: *Pennsylvania State Police, Bureau of Liquor Control Enforcement*

A. The Legislative History of Section 4-498 and its Predecessor Regulation

The government asserts that the purpose of its restriction on price advertising is to prevent excessive consumption of alcohol beverages. *Hospitality II* 47a. But the co-sponsor of the bill that became Section 4-498 urged its passage based on a completely different purpose: "If we are ever going to put these Beer Worlds of Pennsylvania [a large beer discounter] out of existence, the ones that are wrecking our small distributors, this is the way to do it; curb their advertising." Pa. Senate, Legis. J., June 17, 1987, App., *infra*, 89a; *see id.* at 91a; *Hospitality I* 55a. Indeed, the authenticity of the "excessive consumption" purpose is belied by the government's omission of its own price advertising from the ban.

Under Pennsylvania law, the exclusive retail seller of wine and distilled spirits for off-premises consumption is the Liquor Board through the State Liquor Stores. *See* Pa. Stat. Ann. tit. 47, § 3-305. As petitioners pointed out below, the ban on price advertising contained in Section 4-498 does not include the Liquor Board among the entities subject to the ban. *Hospitality II* 66a; Brief of Appellee, *Hospitality I*, at 14.

Even if the government intended its ban on price advertising to cause a reduction in excessive consumption, neither the legislative history of Section 4-498, nor the record in these cases, contains any evidence of that alleged

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v. Hospitality Investments of Philadelphia, Inc., 1994 WL 643906 (No. 77 E.D. 1992) (Pa. Nov. 3, 1994) ("*Hospitality I* ——a"); *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Nighttime Concepts, Inc.*, 1994 WL 643907 (No. 78 E.D. 1992) (Pa. Nov. 3, 1994) ("*Nighttime* ——a"); and *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, 1994 WL 643922 (No. 80 E.D. 1992) (Pa. Nov. 3, 1994) ("*Hospitality II* ——a").

causal connection. *See* App., *infra,* 86a-97a. To the contrary, the government expressly concluded in 1985 that no such causal connection exists when it decided to rescind Section 13.41(a), the predecessor regulation to Section 4-498. Section 13.41(a) required that advertisements placed by "[m]anufacturers, importing distributors and distributors of malt or brewed beverages . . . make no direct or indirect reference to the price . . ." at which those beverages are offered for sale. 40 Pa. Code § 13.41(a). In rescinding Section 13.41(a), the Liquor Board concluded that since beer advertising is generally allowed in Pennsylvania, "the addition of price advertising would not itself stimulate additional consumption or abuse." Order Adopting Regulations (Pa. Liquor Cont. Bd., Sept. 4, 1985) ("Liquor Board Order"), App., *infra,* 78a. Similarly, as petitioners noted below (*Hospitality I* 44a-45a), the Attorney General of Pennsylvania also concluded that the ban on beer price advertising should be rescinded because, *inter alia,* "Excessive Consumption Of Beer Will Not Result."[4] App., *infra,* 51a. The economist retained by the Attorney General was able to reach a "firm conclusion on this point" because (1) "[s]tates allowing price advertising had no higher rates of consumption than states prohibiting it," (2) "[t]he demand for beer is inelastic meaning a decrease in price will not bring about a corresponding increase in consumption," and (3) "[t]he price inelasticity for beer has been proven by other studies." *Id.* at 55a (citations omitted).

The Liquor Board and the Pennsylvania Attorney General made several other noteworthy findings in connection with the rescission of Section 13.41(a). Both concluded that consumers benefit by being informed of alcohol

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[4] *Report to the Pennsylvania Liquor Control Board on Beer Price Advertising* (Pa. Commw. Office of Att'y Gen. Antitrust Section 31, 1985) ("Attorney General's Report"). App., *infra,* 50a. Although the Attorney General's Report itself was not part of the record before the Pennsylvania Supreme Court, it was specifically identified and its conclusions described by petitioners in the record. *Hospitality I* 44a-45a.

beverage prices. Liquor Board Order, App., *infra,* 81a; Attorney General's Report, App., *infra,* 53a-54a. The Attorney General stated that past economic studies "support the proposition that price advertising will result in lower prices to consumers." Attorney General's Report, App., *infra,* at 53a (citations omitted).

In addition, the Attorney General concluded that, even if the asserted concerns about increased consumption had merit, "there are less restrictive alternatives to respond to these concerns than the total prohibition of price advertising," such as "increasing the awareness of the consequences of alcohol abuse" and "tighter enforcement of existing safeguards." *Id.* at 57a-58a. Pennsylvania's most obvious existing safeguard is its law that prohibits licensees and State Liquor Stores from providing alcohol beverages to any person "visibly intoxicated," to "habitual drunkards," or to "persons of known intemperate habits." Pa. Stat. Ann. tit. 47, § 4-493(1). Pennsylvania also prohibits licensees from furnishing alcohol beverages to minors. *Id.* Further, Pennsylvania prohibits licensees or State Liquor Stores from offering anything of value to consumers to induce them to purchase alcohol beverages. Pa. Stat. Ann. tit. 47, § 4-493(24). Neither the legislative history of Section 4-498, nor the record in these cases, contains any evidence that the government considered tighter enforcement of existing laws, education or any other alternatives to reduce excessive consumption that would have been less restrictive on commercial speech.

B. Proceedings Below

All three cases started with evidentiary hearings before an Administrative Law Judge ("ALJ") concerning the Bureau's citation of petitioners for violating Section 4-498. The parties did not dispute that petitioners' advertisements identified the price of alcohol beverages and, therefore, violated Section 4-498. Although petitioners argued in both *Hospitality I* and *Nighttime* that enforcement of Section 4-498 was impermissible under the First Amend-

ment, the ALJ correctly stated that she lacked jurisdiction to hold the statute unconstitutional. App., *infra,* 43a, 47a. Pursuant to Section 4-471 of the Pennsylvania Liquor Code, Pa. Stat. Ann. tit. 47, § 4-471, the ALJ imposed fines on petitioners for violating Section 4-498. App., *infra,* 40a, 44a, 47a.

Petitioners appealed to the Liquor Board, which affirmed the ALJ's decisions. App., *infra,* 31a, 33a, 35a. Petitioners again pressed their First Amendment argument in *Hospitality I* and *Nighttime,* but the Liquor Board too correctly stated that it lacked jurisdiction to decide the issue.[5]

Petitioners then appealed to the Court of Common Pleas on the ground that Section 4-498 violates their commercial speech rights guaranteed by both the Pennsylvania and United States Constitutions. In a single oral ruling that applied to all three cases, the Court held Section 4-498 unconstitutional under the Pennsylvania Constitution, and did not reach the First Amendment issue. App., *infra,* 21a, 23a, 28a. The Bureau's appeal from that ruling to the Commonwealth Court of Pennsylvania was transferred to the Supreme Court of Pennsylvania, which has exclusive jurisdiction of cases where the Court of Common Pleas has held a statute unconstitutional.

The Supreme Court of Pennsylvania reversed in an opinion issued in *Hospitality I, id.* at 1a-16a, and incorporated by reference in *Hospitality II* and *Nighttime, id.* at 17a, 19a. The Pennsylvania Court expressly rejected petitioners' argument that Section 4-498's ban on their truthful price advertising must be scrutinized pur-

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[5] Given that the ALJ and the Liquor Board lacked jurisdiction to decide the First Amendment issue, the fact that petitioner did not raise it in *Hospitality II* did not constitute a waiver. Rather, the constitutional argument was preserved for appeal to the courts of Pennsylvania, *see Bunch v. Pennsylvania State Board of Auction Examiners,* 620 A.2d 578, 581 (Pa. Commw. Ct. 1993), *appeal denied,* 642 A.2d 488 (Pa. 1994), where it was raised.

suant to the First Amendment principles set forth in *Central Hudson Gas and Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980) ("*Central Hudson*") and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("*Virginia Pharmacy*"). *Id.* at 3a. Instead, the court ruled that because petitioners' commercial speech concerns alcohol beverages, Pennsylvania's regulation of that speech is "governed initially by the Twenty-first Amendment to the United States Constitution which repealed prohibition." *Id.*

The Pennsylvania Court then created an unprecedented test for evaluating the constitutionality of restrictions on commercial speech that concerns alcohol beverages: "[r]estrictions may be imposed so long as they bear a reasonable relation to the evil sought to be controlled." *Id.* at 4a. Applying this test, the court held, based on no evidence whatsoever, that "it is reasonable to accept that banning price advertising is *prima facie* consonant" with the purpose of restraining alcohol consumption. *Id.* The court added that restrictions on petitioners' speech are particularly justified because the "acquisition of a liquor license is a privilege and not a right." *Id.*

The Pennsylvania Court stated that its rejection of the "careful balancing of competing interests as is usually done in free speech cases" was "clinch[ed]" by three decisions of this Court that implicate both the Twenty-first and First Amendments, *California v. LaRue*, 409 U.S. 109 (1972) ("*LaRue*"), *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) ("*Bellanca*"), and *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986) ("*Iacobucci*"). App., *infra*, 5a. Although the Pennsylvania Court recognized that those cases did not involve commercial speech, it nonetheless found them controlling because they involved "live sexual entertainment or nude dancing," forms of expression that in the Pennsylvania Court's unsupported view are "usually ac-

corded greater protection" than commercial speech. *Id.* The Pennsylvania Court asserted that this Court's Twenty-first Amendment discussions in *LaRue, Bellanca* and *Iacobucci* (*"LaRue, et al."*) required it to accord Section 4-498 an "added presumption of validity" and to apply a "reasonable relationship" test to uphold the constitutionality of Pennsylvania's price advertising ban. *Id.* at 6a.

In dissent, Justice Castille refuted the majority's reliance on the Twenty-first Amendment, stating that "the [United States] Supreme Court has repeatedly affirmed the principle that neither the text nor the history of the Twenty-first Amendment suggests that it in any way limits the exercise of established individual constitutional rights." *Id.* at 8a (citations omitted). He explained that *LaRue, et al.* "merely stand for the proposition that the states have sufficient police power under the Twenty-first Amendment to override the relatively weak First Amendment interests of those providing sexually provocative entertainment in a facility operating with a liquor license." *Id.* at 10a (citations omitted). As to the majority's assertion that "live, sexually-explicit entertainment is generally accorded greater constitutional protection than commercial speech," Justice Castille concluded that it "profoundly misinterprets federal caselaw." *Id.* at 11a n.3.

Justice Castille emphasized that restrictions on commercial speech must be carefully scrutinized under the four-prong test originally set forth in *Central Hudson. Id.* at 12a. He explained that the government failed to meet its burden under the third prong of that test, because "it offered no empirical evidence or any other evidence" to prove that its ban on alcohol price advertising directly and materially advances its asserted goal of reducing excessive consumption.[6] *Id.* Justice Castille also noted that

[6] Justice Castille's numbering of the four prongs of the *Central Hudson* test differs from this Court's traditional numbering, which is used in this Petition. Justice Castille's first prong is the tra-

petitioners had offered evidence to the contrary. *Id.* at 13a. Turning to the fourth prong, Justice Castille stated that the government "failed to argue, much less prove, that the regulation is written or applied no more restrictively than necessary to achieve its asserted interest." *Id.*

Justice Castille concluded his dissent:

> The majority opinion simply goes too far in sustaining the challenged regulation without an analysis of the free speech protections afforded the licensee under the First Amendment of the federal constitution . . . . Commercial free speech warrants more protection than the majority is willing to confer.

Id. at 14a.[7]

REASONS FOR GRANTING THE PETITION

The federal and state courts substantially conflict as to whether the Twenty-first Amendment affects the level of judicial scrutiny of state-imposed restrictions on truthful, non-misleading alcohol beverage advertising. The Pennsylvania Court's unprecedented holding that the Twenty-first Amendment strips such advertising of all First Amendment protection is erroneous. Had the Pennsylvania Court applied any meaningful First Amendment test to Section 4-498, it would have necessarily found it an impermissible restriction on commercial speech. Moreover, the constitutional rights at stake in these cases are important, and the Twenty-first Amendment issue has direct bearing on similar state-imposed restrictions and pending lawsuits.

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ditional third prong, and his third prong is the traditional fourth prong. There is no difference between the substance of the test as described by Justice Castille and as it appeared originally in *Central Hudson.*

[7] A second dissenting opinion based on the Pennsylvania Constitution, not the federal Constitution, was filed by Justice Flaherty. App., *infra,* 15a-16a.

I. THE PENNSYLVANIA COURT'S UNPRECEDENTED HOLDING THAT THE TWENTY-FIRST AMENDMENT ELIMINATES FIRST AMENDMENT PROTECTION FOR COMMERCIAL SPEECH CONCERNING ALCOHOL BEVERAGES AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE FEDERAL AND STATE COURTS

No court has ever gone as far as the Pennsylvania Court's declaration that the Twenty-first Amendment overrides all First Amendment protection for commercial speech concerning alcohol beverages. Nonetheless, there is a growing split of authority in the federal and state courts concerning what impact, if any, the Twenty-first Amendment has on the First Amendment's protection of such speech. The only realistic prospect for resolving that conflict is a decision from this Court.

A majority of the 13 judges of the Fifth Circuit who considered this issue *en banc* expressly rejected the argument that the Twenty-first Amendment weakens the First Amendment's protection of alcohol beverage advertising. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 755 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259 (1984) ("*Dunagin*") (five dissenting judges incorporating prior panel opinion that the Twenty-first Amendment does "not change the standard of review" for restrictions on commercial speech, 701 F.2d 314, 330); *id.* at 753-54 (two concurring judges rejecting expansion of Twenty-first Amendment as "mischievous and insidious").[8]

Similarly, the Michigan Court of Appeals held in *Michigan Beer and Wine Wholesalers Association v. Attorney General*, 370 N.W.2d 328, 335 (Mich. Ct. App. 1985), *cert. denied*, 479 U.S. 939 (1986) ("*Michigan Beer*"),

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[8] The *Dunagin* court upheld the constitutionality of Mississippi's intrastate liquor advertising ban, but only the plurality opinion, adopted by a six-judge minority, relied on the Twenty-first Amendment.

that the "Twenty-first Amendment does not require us to deal with restraints on freedom of speech any differently than we would if alcoholic beverages were not involved." *See also Wise v. Tennesee Alco. Bev. Comm'n,* No. 81-325-I, *slip op.* at 10-11 (Tenn. Ct. App., Apr. 13, 1982) (unanimous opinion declaring alcohol advertising ban unconstitutional under Tennessee Constitution; expressing skepticism in *dicta* that the Twenty-first Amendment "has any significant effect" upon the exercise of commercial speech rights under the First Amendment), App., *infra,* 107a-108a.

The three courts that have held—erroneously in our view—that the Twenty-first Amendment reduces commercial speech rights not only directly conflict with the *Dunagin* majority and *Michigan Beer,* but also substantially disagree with each other as to the extent of that reduction. The Pennsylvania Court stands alone in holding that the Twenty-first Amendment completely overrides the First Amendment, and that the intermediate scrutiny of *Central Hudson* must be replaced by a "reasonable relationship" test. The other two courts that have relied on the Twenty-first Amendment at least purport to apply *Central Hudson,* but they differ as to how that test should be altered where commercial speech concerns alcohol beverages. *See 44 Liquormart, Inc. v. Rhode Island,* 39 F.3d 5 (1st Cir. 1994), *petition for cert. filed* (U.S. Dec. 27, 1994) (No. 94-1140); *Oklahoma Telecasters Ass'n v. Crisp,* 699 F.2d 490, 499-500 (10th Cir. 1993) ("*Oklahoma Telecasters*"), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984). The *44 Liquormart* court appeared to rely on the Twenty-first Amendment solely to relax its scrutiny under the third prong—whether the restriction on speech directly and materially advances the asserted governmental interest. 39 F.3d at 8. In *Oklahoma Telecasters,* the court stated that the Twenty-first Amendment required it to give added deference to the government not only under the third prong, but also the second prong—whether the asserted

governmental interest is substantial—*and* the fourth prong —whether the restriction is no more extensive than necessary to serve the asserted interest.[9] 699 F.2d at 499-502.

The Pennsylvania Court's decision to deprive petitioners' truthful price advertising of all First Amendment protection simply because it concerns alcohol beverages lies at one extreme of a wide range of irreconcilable federal and state court opinions. This Court should grant certiorari to review and resolve these important conflicts.

II. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA IS ERRONEOUS

A. The Twenty-first Amendment Does Not Deprive Truthful Alcohol Price Advertising of All First Amendment Protection

Since *Virginia Pharmacy*, this Court has consistently held that commercial speech is a valued component of the

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[9] As purported support for its expansion of the Twenty-first Amendment, the *Oklahoma Telecasters* court mistakenly relied on this Court's summary dismissal "for want of a substantial federal question," in the appeal from *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio) ("*Queensgate*"), *appeal dismissed*, 459 U.S. 807 (1982). There, the Supreme Court of Ohio upheld a much narrower ban than Section 4-498: the challenged regulation permitted all off-premises price advertising unless it referred to "price advantage." *Queensgate*, 433 N.E.2d at 139 n.1. The precedential effect of summary dismissals is limited to "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Plainly, the *Oklahoma Telecasters* court read too much into this Court's dismissal in *Queensgate*, because the jurisdictional statement did not even mention the Twenty-first Amendment. *See Oklahoma Telecasters*, 699 F.2d at 496-97. Similarly, the Ohio Court only cited the Twenty-first Amendment when discussing whether the State had the power generally to regulate alcohol beverage advertising, not whether the particular regulation satisfied the third and fourth prongs of *Central Hudson*. *See Queensgate*, 433 N.E.2d at 141-42.

national discourse, entitled to First Amendment protection. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511 (1993) ("*Discovery Network*"). Protection of commercial speech stems from recognition of its unique role in the development of consumer awareness in a free enterprise economy. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) ("*Edenfield*"); *Virginia Pharmacy*, 425 U.S. at 761-62. Two seminal commercial speech decisions, *Virginia Pharmacy* and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) ("*Bates*"), struck down price advertising bans like Section 4-498. Disregarding this Court's precedents, the Pennsylvania Court incorrectly held that Section 4-498's ban on price advertising receives no First Amendment scrutiny solely because it was purportedly adopted pursuant to Pennsylvania's Twenty-first Amendment power. App., *infra*, 6a.

But "the [Twenty-first] Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) ("*Capital Cities*") (citations omitted). Instead, " 'the Amendment primarily created an exception to the normal operation of the Commerce Clause.' " *Id.* (citation omitted). "Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful . . . . 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' " *Craig v. Boren*, 429 U.S. 190, 206 (1976) (citation omitted). Accordingly, this Court has held repeatedly that the Twenty-first Amendment does not alter the customary judicial analysis of governmental restrictions on individual constitutional rights. *See id.* at 207 (equal protection rights); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (First Amendment establishment clause rights); *Wiscon-*

sin v. Constantineau, 400 U.S. 433, 436 (1971) (due process rights).

The Court has created a narrow exception to this principle where States prohibit simulated sexual acts, nudity or topless dancing on premises licensed to sell alcohol, noting that the Twenty-first Amendment confers in that context an "added presumption in favor of the validity of the state regulation." *LaRue,* 409 U.S. at 118; *see Iacobucci,* 479 U.S. at 97; *Bellanca,* 452 U.S. at 718. In his dissenting opinions, Justice Stevens has criticized even that narrow exception as "blatantly incorrect," *id.* at 725: "[n]either the plain language nor a fair construction of the purpose of the Twenty-first Amendment lends any support to the Court's holding that the Twenty-first Amendment shields restrictions on speech from full First Amendment review." *Iacobucci,* 479 U.S. at 97.

The Pennsylvania Court has unsupportably expanded the narrow exception set forth in *LaRue, et al.* Those cases are not relevant because (1) the statutes challenged in each were an exercise of core Twenty-first Amendment power to regulate the conditions for alcohol sales on licensed premises—nowhere else—and thus only indirectly regulated expressive activity, *and* (2) they involved expression (conduct, really) "only marginally" within "the outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566 (1991). *See Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932-33 (1975); App., *infra,* 10a (Castille, J., dissenting); Laurence H. Tribe, *American Constitutional Law* § 6-24 at 478 n.15 (2d ed. 1988). In contrast, Section 4-498 regulates pure commercial speech, not marginal expressive conduct, and prohibits price advertising everywhere *except* on licensed premises (by everyone except the Liquor Board, which is unrestricted in its price advertising).

The error of the Pennsylvania Court's expansion of *LaRue, et al.* is underscored by this Court's holding in *Capital Cities* that a State's regulation of alcohol beverage

advertising is at best a weak exercise of Twenty-first Amendment power. There, the Court struck down on federal preemption grounds Oklahoma's requirement that cable television operators delete advertisements for certain alcohol beverages when retransmitting out-of-state signals within Oklahoma. 467 U.S. at 715. The Court held that Oklahoma's interest in discouraging alcohol consumption by restricting some (but not all) advertising was "modest," and engaged "only indirectly" its core Twenty-first Amendment power "of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* (citation omitted).

Section 4-498 actually represents an even more modest exercise of asserted Twenty-first Amendment power than Oklahoma's statute, because it omits the exclusive retailer of wine and spirits for off-premises consumption (*i.e.*, the government itself) from its ban on price advertising. Indeed, Section 4-498 is not a Twenty-first Amendment exercise at all to the extent that it was actually adopted for the purpose of economic protectionism (*see* this Petition at 4)—a purpose wholly unrelated to Pennsylvania's Twenty-first Amendment power. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). Given the Court's conclusion in *Capital Cities* that the federal interest in uniform cable industry regulation outweighed Oklahoma's modest exercise, 467 U.S. at 715-16, the constitutional values of the First Amendment must substantially outweigh Pennsylvania's even more modest Twenty-first Amendment exercise.

Various courts and judges have correctly limited *LaRue, et al.* to their facts. *Michigan Beer*, 370 N.W.2d at 334-35; *Dunagin*, 718 F.2d at 755 (five dissenting judges incorporating prior panel opinion, 701 F.2d at 326-28); *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 551-53 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994),

petition for cert. filed (U.S. Dec. 27, 1994) (No. 94-1140); App., *infra*, 9a-10a (Castille, J., dissenting); *see Dunagin*, 718 F.2d at 753-54 (concurring opinion). Further, those few opinions that have erroneously expanded *LaRue, et al.* as purportedly supporting a reduction of First Amendment protection for alcohol beverage advertising have been widely and uniformly criticized.[10]

The Pennsylvania Court has gone far beyond any other court in its unprincipled expansion of *LaRue, et al.* Under its novel "reasonable relationship" test, the States would have virtually unlimited power to restrict or ban truthful communications about a lawful product. That result is antithetical to the commercial speech doctrine: "the general rule is that the speaker and the audience, not the government, assess the value of information presented." *Edenfield*, 113 S. Ct. at 1798. Further, adoption of the ineffectual "reasonable relationship" test by other courts would intolerably "create radical disparities in First Amendment protections from State to State." *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 n.16 (1990) (plurality opinion). The Pennsylvania Court erred in holding that the Twenty-first Amendment trumps the First Amendment in the context of alcohol beverages.[11]

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[10] *See, e.g.*, Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 Iowa L. Rev. 909, 943 (1992); Richard S. Mandel, Note, *Liquor Advertising: Resolving the Clash Between the First and Twenty-first Amendments*, 59 N.Y.U. L. Rev. 157, 179-82 (1984); Brian S. Steffey, Recent Development, *Tension between the First and Twenty-first Amendments in State Regulation of Alcohol Advertising*, 37 Vand. L. Rev. 1421, 1448 (1984); Karen L. Sterchi, Note, *Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 Notre Dame L. Rev. 779, 799 n.70 (1985).

[11] In a further attempt to justify its "reasonable relationship" test, the Pennsylvania Court resurrected the hoary "right-privilege" distinction to argue that petitioners gave up their constitutional right to commercial speech when they were granted the "privilege" of a liquor license. App., *infra*, at 4a. But even 32 years ago,

B. The Government Failed to Meet Its Substantial Burden under *Central Hudson*

This Court's test for reviewing restrictions on commercial speech is the rigorous *Central Hudson* test, a far cry from the Pennsylvania Court's "reasonable relationship" test. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994). Under *Central Hudson*, "the State's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful.'" *Id.* (citation omitted). If the government cannot satisfy its burden of proof on the second, third and fourth prongs of *Central Hudson*, a restriction on commercial speech cannot pass constitutional muster. *Central Hudson*, 447 U.S. at 566. The government in these cases did not create a record that satifies any part of its burden.

Under the second prong, the government asserts that the problem of excessive alcohol consumption gives rise to a substantial interest in keeping truthful price information from adults. But Section 4-498 inconsistently does not ban the government—which has a monopoly on the sale of wine and spirits for off-premises consumption—from advertising the prices of the products sold in its State Liquor Stores. "[T]he selective approach [Pennsylvania] has taken toward [alcohol price] advertising suggests limits on the substantiality of the interests it asserts here." [12] *Capital Cities*, 467 U.S. at 715.

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it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a right or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

[12] Apparently, the Liquor Board is concerned about the omission of its own advertising from the ban. Soon after Section 4-498 was passed, the Liquor Board stopped including prices in its advertising, although it still advertises that certain brands are "on sale." Of course, the Liquor Board is free to commence price advertising again. Its current self-restraint is irrelevant to the constitutionality of Section 4-498, which by its terms applies only to private sector participants in the alcohol beverage industry.

Indeed, Pennsylvania's selective approach reveals that its "stated interests are not the actual interests served by the restriction." *Edenfield,* 113 S. Ct. 1798 (citation omitted). As disclosed by the legislative history, the actual interest served by Section 4-498 is the protection of small beer distributors by prohibiting large discounters from advertising their lower prices. *See* Pa. Senate, Legis. J., June 17, 1987, App., *infra,* 89a, 91a. Such economic protectionism cannot qualify as a substantial interest under the second prong. *See Rice v. Alcohol Bev. Cont. Appeals Bd.,* 579 P.2d 476, 493 (Cal. 1978) ("*Rice*").

The insubstantiality of the government's asserted interest is underscored by its express recognition, through both the Liquor Board and the Pennsylvania Attorney General, that consumers benefit by being informed of alcohol beverage prices. Liquor Board Order, App., *infra,* 81a; Attorney General's Report, App., *infra,* 53a-54a. For example, price advertising helps a budget-conscious consumer locate an inexpensive bar. Moreover, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates,* 433 U.S. at 377 (citations omitted); *see* Attorney General's Report, App., *infra,* 53a-54a (expressing same proposition in context of beer price advertising). The second prong of *Central Hudson* cannot be satisfied by the government's belief here that consumers should be "kept in ignorance." *Virginia Pharmacy,* 425 U.S. at 769; *see Central Hudson,* 447 U.S. at 574 (concurring opinion) (expressing "serious[] doubt" whether suppression of price information "is ever a permissible way for the State to 'dampen' demand" for a lawful product).

The government also failed to satisfy its burden under the third prong of *Central Hudson*:

> This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must dem-

> onstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Edenfield, 113 S. Ct. at 1800.

The government "offered no empirical evidence or any other evidence" to prove that its ban on price advertising directly and materially reduces excessive consumption of alcohol beverages. App., *infra,* 12a (Castille, J., dissenting). For this reason alone, the government failed to saitsfy the third prong. *See Ibanez,* 114 S. Ct. at 2090; *Edenfield,* 113 S. Ct. at 1800; *Michigan Beer,* 370 N.W. 2d at 336. Moreover, the government, through both the Liquor Board and the Pennsylvania Attorney General, explicitly concluded that beer price advertising does *not* cause increased consumption when it advocated rescission of Section 4-498's predecessor regulation. *See* this Petition at 4-5. This concession in 1985, coupled with the lack of any new or contrary evidence, would make a third prong argument in these cases incredible. No wonder none was offered by the government.

The Pennsylvania Court speculated that "[b]y its very nature, price advertising (typically discount price advertising) is designed to encourage consumption by promoting and increasing the sale of alcoholic beverages." App., *infra,* 4a. Such speculation is inadequate as a matter of law, *Edenfield,* 113 S. Ct. at 1800, and in conflict with the scientific evidence accepted by the government itself, *see* this Petition at 4-5. Moreover, it ignores the most obvious reason why a retailer would advertise its prices: to attract consumers to its establishment rather than a competitor's establishment, regardless of whether those consumers will drink one sip more than they would elsewhere. *See Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 39 (1966) (citing studies showing that compulsory retail price maintenance had " 'no significant effect upon the consumption of alcoholic beverages' "); *Rice,* 579 P.2d at 494 (expressing doubt that

significant relationship exists between direct price control of alcohol and excessive consumption).[13]

The government also failed to satisfy the fourth prong of *Central Hudson*, which requires it to demonstrate that its restriction is "no more extensive than necessary to serve" the asserted interest. *Ibanez*, 114 S. Ct. at 2088 (citation omitted). In determining whether the fourth prong has been met, courts must give weighty consideration to the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech." *Discovery Network*, 113 S. Ct. at 1510 n.13 (city's failure to address concern about unsightly newsracks by regulating size, shape, appearance or number demonstrated that fit was not "carefully calculated"); *see New York State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 844 (2d Cir.), *cert. denied*, 115 S. Ct. 511 (1994); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1239 (E.D.N.Y. 1993) (government's failure to address its concern about excessive consumption through "sensible" alernatives that did not restrict speech, such as education, demonstarted that fit was unreasonable).

Section 4-498 must fall under the fourth prong because, as Justice Castille noted, the government "failed to argue, much less prove" that Section 4-498 is no more restrictive than necessary to reduce excessive consumption of alcohol beverages. App., *infra*, 13a. The government submitted no evidence that it considered any alternative measures to increase personal responsibility for alcohol beverage consumption. Moreover, the government, through the Pennsylvania Attorney General, expressly admitted that there are "less retrictive alternatives" to address ex-

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[13] Skepticism about the "excessive consumption" rationale was expressed even by the one co-sponsor of Section 4-498 who relied on that rationale. He admitted that "the issue is debatable," and urged passage of the bill only because "[m]any people in the Bible Belt of this state who support liquor control feel that such advertising would have an impact on the consumption of alcohol . . . ." Pa. Senate, Legis. J., June 17, 1987, App., *infra*, 88a.

cessive consumption, such as alcohol abuse education and tighter enforcement of existing laws, when it supported rescission of Section 4-498's predecessor regulation. Attorney General's Report, App., *infra,* 57a-58a; *see* this Petition at 6 (describing Pennsylvania's existing laws).

Had the Pennsylvania Court applied the *Central Hudson* test, rather than its unprecedented "reasonable relationship" test, it necessarily would have found that the government has not satisfied the second, third or fourth prong. As Justice Castille stated, the government "failed to shoulder its burden regarding even the minimum standards of analysis and substantive protection as required by the U.S. Supreme Court and the federal constitution." App., *infra,* 13a.

III. THE QUESTIONS PRESENTED RAISE IMPORTANT CONSTITUTIONAL ISSUES WITH DIRECT BEARING ON SIMILAR RESTRICTIONS AND PENDING LAWSUITS

As this Court stated in *Bates,* "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." 433 U.S. at 364. Under the Pennsylvania Court's decision, however, the First Amendment will provide no barrier to States that improperly choose to reduce or shut off altogether the flow of commercial speech concerning a major category of consumer products. The rights of alcohol beverage manufacturers, distributors and retailers to communicate truthful information to consumers, and the rights of consumers to receive that information, are too important to allow the Pennsylvania Court's decision to stand.

The questions raised here bear directly on the constitutionality of numerous restrictions on alcohol beverage advertising.[14] Indeed, the Twenty-first Amendment

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[14] *See, e.g.,* Ark. Alco. Bev. Cont. Div. Regs. § 3.17 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ark.] ¶ 4217 at 7247

issue is currently being litigated in three additional cases. First, a petition for a writ of certiorari is pending in the *44 Liquormart* case, based, *inter alia*, on the following question: "Does the Twenty-first Amendment weaken the protection the First Amendment affords truthful, non-misleading price advertising by relieving the state of the burden to prove that its restriction on speech directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest?" Second, in *Bentsen v. Coors Brewing Co.*, No. 93-1631 (U.S. Apr. 15, 1994), *cert. granted*, 114 S. Ct. 2671 (Jun. 13, 1994), which was argued before this

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(1994) (prohibiting advertising of discount sales); Conn. Dep't of Liquor Const. Regs. § 30-6-A40 (1976) *reprinted in* Liquor Cont. L. Rep. (CCH) [Conn.] ¶ 6034H at 10,221 (limiting price advertising); Ga. Alco. Bev. Code § 560-2-4-.15 (1994) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ga.] ¶ 4158 at 13,244 (prohibiting price advertising by "off-premise" licensees except within the establishment); Kan. Stat. Ann. § 41-714(2) (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [Kan.] ¶¶ 7236-38 at 18,427 (prohibiting retailers from billboard advertising); Minn. Liquor Cont. Div. Regs. § 7515.0760(2) (1985) *reprinted in* Liquor Cont. L. Rep. (CCH) [Minn.] ¶ 4038(2) at 25,222 (banning price advertising except in windows and premises of licensed establishments); Mo. Div. of Liquor Cont. Regs. § 11 CSR 70-2.240(18) (1986) *reprinted in* Liquor Cont. L. Rep. (CCH) [Mo.] ¶ 4142G(18) at 27,232 (prohibiting manufacturers and wholesalers from price advertising); N.H. Rev. Stat. Ann. § 179:51 (1992) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.H.] ¶ 7251 at 31,429-30 (prohibiting listing of retail prices by a wholesaler on behalf of a distributor); N.C. Admin. Code tit. 4, r. 2R.1008(c)(2) (1984) *reprinted in* Liquor Cont. L. Rep. (CCH) [N.C.] ¶ 4448(c)(2) at 35,254 (prohibiting "on-premise" licensees from advertising the brand name of any alcohol beverage); Ohio Rev. Code Ann. § 4301.211 (Anderson 1989) *reprinted in* Liquor Cont. L. Rep. (CCH) [Ohio] ¶ 7172A at 37,419 (prohibiting price advertising for malt beverages except within the licensed establishment); R.I. Gen. Laws § 3-8-7 (1987) *reprinted in* Liquor Cont. L. Rep. (CCH) [R.I.] ¶ 7210 at 41,423-3 (prohibiting price advertising for alcohol beverages except within the licensed establishment); S.C. Alco. Bev. Cont. Comm'n § 7-34 (1991) *reprinted in* Liquor Cont. L. Rep. (CCH) [S.C.] ¶ 4034 at 42,212 (prohibiting retailers from price advertising).

Court on November 30, 1994, the government explicitly contended that the Twenty-first Amendment affords an "added presumption" of constitutional validity to its law banning the disclosure of alcohol strength on malt beverage labels.[15] Brief for the Petitioner at 41-47. Third, an appeal is pending in the Fourth Circuit from the district court's decision upholding Baltimore's ban on billboard advertising for alcohol beverages. *Anheuser-Busch, Inc. v. Mayor & City Council of Baltimore,* Nos. 94-1431, 1432 (4th Cir. May 31, 1994). There, a municipality is arguing that the Twenty-first Amendment reduces First Amendment protection for the restricted speech to a "rational basis" test. Brief of Appellees at 17-18.

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[15] Unlike these cases, *Coors* does not squarely present the issue of the tension between the First and Twenty-first Amendments. As the respondent in *Coors* explained, the Court may reject the government's argument for the simple reason that the Twenty-first Amendment by its terms applies only to the States, and the labeling prohibition is a *federal* law.

CONCLUSION

The state and federal courts are divided on what impact, if any, the Twenty-first Amendment has on the First Amendment rights of the entire alcohol beverage industry. In its unprecedented decision, the Supreme Court of Pennsylvania erroneously held that the Twenty-first Amendment strips that major national industry of all First Amendment protection for its commercial speech. The cases on this important constitutional issue have been proliferating, and more litigation is likely given that many States have imposed similar restrictions on alcohol beverage advertising. The petition for a writ of certiorari should be granted.

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